the principal case, as Archbishop Kenrick knew of the devise during testatrix's life, and there was evidence that he had declared he would carry out her intentions, and that such declaration was reported to her. The very case arose therefore which is put by Judge SHARSWOOD as one in which the court would fasten a trust on the devisee, and therefore the mortmain act would operate.

I. F. R.

Supreme Court of Vermont.

THE STATE EX REL. JOHN B. PAGE *v.* J. GREGORY SMITH ET AL.

The fact of merger depends largely on intention, and this rule applies to a case where a corporation purchases shares of its own stock. The purchase suspends the right to vote on the shares, and may be a merger if so intended; but if not so intended, it is not a merger, and the presumption is that the corporation does not intend a merger, but to hold the stock as assets, or to sell and reissue it.

A quorum of the directors of a corporation are competent to act within the scope of their powers and to bind the corporation, although the meeting was not regularly called and there was no notice to the other directors.

A sale of the company's shares of its own stock, made at such a meeting of the directors, if made *bonâ fide* and for full value, and for the purpose of raising money to meet an urgent necessity of the company, passed a good *primâ facie* to the shares, and could only be set aside for cause, upon a direct proceeding for that purpose. Any director or stockholder desiring to avoid such sale, must proceed at once to dispute it in legal form; acquiescence until the consideration has been appropriated to the benefit of the corporation, is a ratification of the sale.

If the sale is otherwise valid, it is not vitiated by the fact that the motive of the purchaser and of some of the directors was to enable the former to vote upon the shares in a certain manner at an approaching election of corporate officers.

Where new stock is issued which is to share in profits with existing stock, all the holders of the latter have an equal right to subscribe for their proportionate part of the new stock, but this rule does not apply to original stock bought in by the corporation and held as assets, and sold for the payment of liabilities or for the general benefit.

MOTION for leave to file an information.

In April 1873 cash subscriptions were made to the capital stock of the Central Vermont Railroad, which were accepted by the commissioners and the stock allotted to the several subscribers. In May the company was organized, and in the same month it was appointed by the Court of Chancery receiver of the Vermont Central and Vermont and Canada Railroads.

Some of the subscriptions had been made by one Park in the names of parties who subsequently repudiated his authority and refused to accept the shares, whereupon Park assumed them himself, and the shares were entered on the stock ledger in his name.

In January 1874, having been advised that they could not cancel these subscriptions, the directors purchased the shares for the company, and had the shares entered in the company's name.

On May 18th 1875, a directors' meeting was called by telegraph, for half past one o'clock at Bellows Falls. This was adjourned for want of a quorum, until four o'clock the same day, on the directors' car, then on a trip for inspection of the road. At four o'clock, a quorum being present in the directors' car, a vote was passed for the sale of the shares held by the company to Langdon and Millis, who were already large stockholders. The shares were paid for by the purchasers and transferred on the company's books on the morning of May 19th, and the purchase-money was appropriated by the directors to the payment of a debt of the company then due and urgent. To raise funds to pay this debt was the reason assigned for the sale of these shares by the directors. On the same day, however, May 19th, there was an election for directors of the company, and it was charged in the present petition that the respondents were elected directors by the votes of Langdon and Millis upon these shares (amounting to 2350), and that the said votes were illegal and the election void.

Daniel Roberts and *E. R. Hoar*, for the relator.

B. F. Fifield and *L. P. Poland*, for the respondents.

1. Corporation may buy its own stock and sell again: *City Bank* v. *Bruce*, 17 N. Y. 507; *Williams* v. *Manufacturing Co.*, 3 Md. Ch. 451; *Robinson* v. *Beall*, 26 Ga. 28; *Taylor* v. *Miami Co.*, 6 Ohio 219; *United States Trust Co.* v. *Harris*, 2 Bosw. 90.

2. The sale was legally made, and at a legal meeting. A meeting regularly called for one place and having no quorum may adjourn to a different place: 8 Cowen 286; 1 Selden 22. Even if there was irregularity in this adjournment the annual inspection trip of the directors in their car is a regular business meeting. Failure to notify the others not present in the morning will not make the meeting illegal: *Bank* v. *Railway Co.*, 30 Vt. 169.

3. There was no pre-emption right in the other stockholders as to these shares: R. M. Charlton 260; 3 Md. Ch. 418.

4. The sale was in good faith to raise money for a debt of the company. Even if there was another incidental motive it is of no consequence. The motive of a legal act is immaterial: *South Royalton Bank* v. *Suffolk Bank*, 27 Vt. 505.

The opinion of the court was delivered by

REDFIELD, J.—This is a petition of the states-attorney for Franklin county for leave to file an information in the nature of a writ of *quo warranto* against the respondents for usurping and exercising the rights of directors of the Central Vermont Railroad. A rule to show cause having been obtained and served on the respondents, the question now comes up whether this court will grant the leave asked.

I. A preliminary question has been discussed, whether, if insufficient cause be shown and leave is granted, a judgment of ouster will be awarded as a matter of right, or as a matter of course. It is not denied that at the time our statute was enacted, and down to the present time, the practice was settled and uniform in the courts of England, that after leave was granted and the information filed, the respondents had time and opportunity to plead to the information. The nature of the application is summary and requires speed, and the court will see to it, that there be no needless delay. The 4th sect. of the Statute of Anne required "proceeding at the most convenient speed that may be," and "an appearance and pleading as of the same term at which the information shall be filed." But the practice in the English courts under that statute was, when the information was filed, if there was not voluntary appearance, to require such appearance by *venire facias*, or compel it by *distringas*. The rule requires the respondents to show cause why an information should not be filed against them; if they omit to show cause, as they may, the rule becomes absolute, and the information is filed.

In the *People* v. *Robinson*, 4 Cow. 97, the respondent had been adjudged guilty upon default of appearance to show cause, and ouster awarded. The court held the judgment irregular and without due process of law, and set it aside as irregular and void. It is noticeable as having been ably argued by the attorney-general on the one side, and *John C. Spencer* on the other, and thoroughly sifted by the court. We think when an information is allowed to be filed, it is the duty of the court to fix some time, ordinarily during the same term, for the respondents to appear and plead; and if they do not voluntarily do so, their appearance will be compelled by due process of law. In *State* v. *Hunton et al.*, 28 Vt. 594, the court, BENNETT, J., questioned the propriety of rendering final judgment of the guilt or innocence of a party on a rule to

show cause why an information should not be filed, and maintained that the rule of practice was otherwise, unless the court should of its own motion institute a new and independent practice of its own. But in that case no question was raised, and, by mutual consent, the parties submitted the whole case upon its merits.

In *State* v. *Bradford*, 32 Vt. 50, the respondents disclaimed any right or title to the offices in question; and the pretended and *de facto* corporation appeared, but made no answer, and asked to have the case decided upon the proofs of the states-attorney. There was no relator upon the record, as the court said should have been. The proof being ample, and the parties appearing and making virtual confession of the truth of the allegations and disclaimer of title to the offices, the court, by implied consent, made an order for the dissolution of the pretended corporation and the ouster of the disclaiming officers.

The statute gives, merely, jurisdiction to this court of these prerogative writs, and prescribes no forms or rules for proceedings, but, by manifest implication, adopted the function and manner of use of the proceedings then uniformly practised in the common-law courts of England.

The analogy of practice in *certiorari* is urged upon us. The analogy is not obvious. The inquiry in the application for *certiorari* is based on the record, and is a substitute in sessions matters for the writ of error, which applies only to common-law procedure. The court examines a copy of the records upon which it is claimed that an erroneous judgment has been rendered in the inferior court; and if the court finds error, it will order the record to be certified into this court, and render thereon such judgment as should have been. The record imports verity, which neither party can dispute.

II. This proceeding is criminal in its form, but civil in its nature, and is addressed to the judicial discretion of this court. It may be allowed or denied, in consideration of rights and consequences, the condition of the property, and its owners, and its relation to the public.

The case discloses that the said corporation has, by the court of chancery, been made receiver, and holds in trust the Vermont Central and Vermont and Canada Railroads, and is operating, under leases, several other railways in this and other states. The trust duties thus imposed are active and executive in their nature, in-

volving important duties and responsibilities, both to the *cestui que trust* and the public, and incurring, necessarily, from day to day, large liabilities in intricate and often complicated transactions in the administration of the trust, which, from the nature of the case, must be largely outstanding and unsettled. One of the incidents of a receivership is a bond, commensurate with the magnitude of the trust, approved by the court of chancery, and to respond to that court for the property, its income, and for all laches of administration. Such bond is presumed to have been furnished by those who have assumed the duties, and have been the active administrators of the trust. If the present incumbents should be ousted, they would have the right to require that their personal liability, by bond or otherwise, should cease with the ouster; and the chancellor would doubtless require new bonds, to respond for any laches of administration. How far personal character, capacity and responsibility, induced the appointment of this corporation as the receiver of this large property and executive trust, is known only to the chancellor. The Court of Chancery has absolute control of the trust and its administrators, and may so temper any order as to restrain wrong and insure justice, while this court has no power, upon this application, but to grant or refuse the petition. Without discriminating as to the fitness or unfitness of *men* for the administration of so important a trust, it is easy to foresee that it is possible for complicated questions to arise between the outgoing and incoming directors as to liability and responsibility, and for a litigation to spring up, subjecting the trust to new burdens, without benefit to the parties or the public. We have no warrant for saying that such mischief would necessarily follow; but to some extent it is possible, and perhaps probable; and though not of controlling weight when there is satisfactory proof that the office has been usurped by force or fraud, yet they are proper matters for consideration in the exercise of that judicial discretion which the petitioners invoke.

III. The *right* of the respondents to hold and exercise the office of directors of this corporation, depends upon the legality of the 2350 votes cast by Langdon and Millis on the stock in question. If such votes were lawfully cast, the respondents were duly elected directors, otherwise not.

Waiving, for the present, all consideration of the alleged conspiracy on the part of the respondents, to forestall by fraud the

majority of the stockholders in the election of the 19th of May last, and assuming that the transaction had wholly occurred six months before, and without reference to an immediate election, we inquire whether Langdon and Millis stand as purchasers and owners of such stock in this corporation

Mr. Park and associates in New York had agreed with Governor Smith and associates in Vermont, that they would subscribe for 20,000 shares of stock in this corporation, in certain agreed proportions. Park, in executing his part of the contract, signed in the names of two friends in New York, 1500 shares without authority, which they repudiated. Whereupon Park assumed such subscription as his own, and the stock was entered upon the books of the corporation as belonging to Park. It is urged that this stock having first been subscribed in the name of Myers and McKinney, was their stock, and that Park, showing no written assignment, had no title or property in it. But Myers and McKinney repudiated the subscriptions, for the reason that Park was without authority to bind them by such contract. Park having subscribed for stock, by an assumed agency not founded in fact, failing to bind the principal, bound himself. The five per cent. paid by Park was then placed to his credit by the corporation, and the subscriptions placed on the books as a subscription by Park in his own right. Park was then not only the equitable owner, but the original subscriber for the stock. The corporation had been made the receiver of this large property, upon the representation that 20,000 shares of stock had been *bonâ fide* subscribed. Park claimed that the corporation ought to relieve him from holding and carrying the stock subscribed in the name of Myers and McKinney; and certain other parties made similar claims. For certain reasons—and we have no right to assume that such reasons were inadequate or improper—the corporation purchased 2350 shares of such stock, and placed it on their books as stock belonging to the corporation, like other assets. It is claimed that thereby said stock became *merged* and extinguished. The intent of the parties, and especially of the corporation, is important in determining the character of such transactions.

The corporation had no right to diminish its capital stock, and especially so under the circumstances of its receivership. And the evidence concurs, that the corporation *purposed*, under advice of counsel, to hold the stock thus purchased as not merged, but sul-

sisting as assets on the books of the company. We think the legal effect of such transfer of the stock is fairly and correctly stated by the court in *Williams* v. *Savage Manuf. Co.*, 3 Md. Ch. Dec. 451, to which we have been referred by counsel for the petitioners; and in the case of *Bank of Columbus* v. *Bruce et al.*, 17 N. Y. 507, referred to by the respondents. In the latter case, SELDEN, J., says: "It might or might not have that effect—extinguish the stock—at the option of the company. I think some manifestation of such intent should be proved, to produce that result." And again he says: "I see nothing to prevent the re-issue and sale by the company of the stock so transferred; and, in the absence of any proof to the contrary, the presumption is that the directors intended to act within the scope of their powers by selling the stock on hand, instead of issuing new stock, which they had no power to create." In the former case, the chancellor says, after reviewing the cases on the subject: "But it does not follow that though the shares transferred to the corporation are merged for the time being, that they may not be subsequently revived; * * * and whatever may be the temporary legal effect of the transfer, it has always been supposed, and the practice has always been with such general understanding, that they were authorized to revive the stock when they saw fit to do so." The sale and transfer of stock, if done by proper authority, and if it was actual and not colorable, and not affected by any secret trust, if a *bonâ fide* and absolute sale, vested in the purchasers the title to the stock, with all the incidents, including the right to vote upon it.

IV. Was the property sold and transferred to the purchasers by such authority as should bind the corporation? We think the majority of directors who assembled on the directors' car and passed the resolutions authorizing the sale of this stock, to meet a liability becoming due on the first of June after, cannot, lawfully, be claimed as organized under the call of the clerk to meet at Bellows Falls, at an earlier hour of the same day. If we should hold that the call of the clerk by telegraph was in accordance with the by-laws, and the time sufficient, we think the attempted adjournment by a minority, to a point fifty miles distant, was irregular, and did not transfer the place of legal *venue* under that call to White River Junction. But a quorum of the directors, regular in form, assembled on the cars, and by resolution, authorized the sale of this stock, and under that authority the stock was sold,

and, as the proofs stand, for adequate and full consideration received by the company.

In *Bank of Middlebury* v. *R. & W. Railroad Co.*, 30 Vt. 169, the court held that the action of a majority of the directors of a corporation, without any notice to the other directors, if within the scope of their authority, was legal, and bound the corporation, and the court says, that "if the authorized agents of the company have extended its business beyond the strict limits of their functions for which the charter was granted, the company has been bound by the extension, unless the corporators interfere to restrain such extension at the earliest moment." See also *Stark Bank* v. *Union Potter Co.*, 34 Vt. 145.

The railroad provisions of our statute provide, p. 216, sec. 3, "That the government and direction of the affairs of every such corporation, shall be vested in a board of not less than five, * * * and a majority of the directors shall form a board, and shall be competent to transact the business of the company." By the express language of the statute, a majority of the directors are constituted a board, with full authority to do what all the directors when assembled could do in "the affairs of such corporation and in the transaction of the business of the company." In *Edgerly* v. *Emerson*, 3 Foster 555, a very well reasoned case, it was held that when a majority of bank directors are by the statute constituted "a board for the transaction of business," that "such board, when assembled, possess all the powers of the entire board of all the directors." The statute of New Hampshire declared that "no less than four directors shall constitute a board for the transaction of business." In that case, BELL, J., says: "There was before no difficulty except as to the point of notice, and the only useful effect of the statute provision relative to a quorum, or the powers of a majority, is, to give them the authority to act in the absence of others and without notice to them. We are therefore of the opinion that when the quorum of a bank meet and unite in any determination, the corporation is bound, whether the other directors are or are not notified." We think that the vote of the majority of the directors thus assembled, was a lawful vote of the "board of directors competent to transact the business of the company;" and if this transfer of the stock was not a transfer merely, but a sale, beneficial to the company, and *bonâ fide*, it vested in the purchaser a title to the stock; and though the "board" of directors

that authorized the sale, was under no regular call, and the two members of the finance committee who effected the sale, may have been personally interested, and moved by partisan influence, yet, if the stock was the principal available assets to meet an impending liability, and was sold for full value, the sale was, at most, voidable only, and could be impeached for cause only, on the seasonable motion of the party claiming to be injured.

The case discloses that the relator was not only a large stockholder, and representing, as he claims, a majority of the stock, but was himself elected one of the directors on the 19th of May, and had been, up to that time, vice president, and chairman of the finance committee. He was aware of the resolution of the directors, and the claim therein that the stock was sold and the money paid to meet the instalment due by contract in a few days for the purchase of the property of the Vermont and Canada Railroad Co. Whether it was necessary to sell this stock, is left on the proof to the parties to the sale, who aver that it was necessary, and that the sale was actual, *bonâ fide*, made for that purpose, without any secret trust, or understanding that the purchase-money was to be returned, or that the purchasers had any other equivalent for their money than the stock thus purchased. So far as this case discloses, there is no question that the money paid for the stock went to the use of the corporation; and all parties have acquiesced in the sale, unless this proceeding may be supposed to have brought it in question. The relator could, then, elect to challenge the validity of the sale and take proceedings to avoid it, and demand that it should be annulled by a return of the consideration to the purchasers, or he could acquiesce in the sale, and allow the consideration to go to the use of the corporation. But if a member of a corporation and associate director claims that the directors, as agents, have exceeded their functions in selling property in derogation of the rights of the corporation, that claim must be seasonably asserted, in a manner that shall bind the parties to such sale; acquiescence would confirm the sale; and allowing the consideration to be appropriated to the use of the corporation, would adopt and ratify it.

It may be claimed that this proceeding to oust certain directors on the ground that they were elected fraudulently by votes upon this stock, is, virtually, a proceeding to avoid this sale. The purchasers are not made parties; Langdon's election is conceded;

Millis never was a director, and claims to be a stockholder by virtue of the ownership of this stock. Whatever may be the order of the court in this case, it could have no effect upon the rights of Langdon and Millis. Suppose a new election should be ordered, as under statute law is the practice in many of the states, and Millis offering his votes on this stock, should be challenged. It could not be claimed, upon any evidence or suggestion in this case, that if the purchase of this stock was voidable, it had not been fully confirmed by acquiescence, and allowing the purchase-money to go to the use of the corporation.

V. It is insisted that there was a pre-emptive right in all the stockholders to purchase a proportionate share of this stock. We are referred to *Gray* v. *The Portland Bank*, 3 Mass. 364, and Ang. on Corp., secs. 554–5. The two sections in Angell seem entirely based upon the former case, and the text is but a quotation from the opinions of SEWELL and SEDGWICK, JJ., who gave the opinions of the court in the case. In that case the plaintiff Gray was a large owner of stock in a banking corporation under a charter that authorized the corporation to issue stock, not less than $100,000, nor over $300,000. The corporators organized under the lesser capital, purchased a banking house, and had accumulated a surplus of profits. The stockholders then voted to enlarge their capital and issue the residue of the stock allowed by their charter, and constituted the directors a committee to issue and distribute the residue of such stock to the existing stockholders. The plaintiff, being a large owner of the stock first issued, and a proportionate owner of the surplus profits of the bank, which was an incident of his stock, tendered the money to said committee, and demanded his proportionate share of the new issue of stock, and was refused. He then sued the bank, in assumpsit, for his share of the dividends on such stock, and for damages for refusal, claiming it to be a breach of contract. The court held that the plaintiff could not recover dividends, because the stock was not owned by the plaintiff; but a good title thereto was vested in the subscribers to whom the directors had distributed it. 2d. The court held that the directors, in issuing new stock to strangers, and thereby making them share-owners in the existing surplus profits, a fixed share of which was then owned by plaintiff, was a wrong to him, for which he might recover.

When *new* stock is issued, which shares equally with the existing

stock, the shareowners have a right that it shall be so distributed as not to divest any stockholder of his present vested right in property; and the proportionate share of the accumulated profit is represented by the shares, and is vested property, as much as the shares themselves. We entirely accord with the reasoning of this case. And if the cases were analogous in their facts, by this authority Langdon and Millis became and are the undisputed owners of the stock in question. But this was not a new issue of stock, but a portion of the original subscription, and its identity has been preserved, as we have shown. The transfer of the stock to the corporation suspends the right to vote upon it, and may be a merger, if so understood by the parties. The right of the directors to reissue or sell such stock for honest purposes and for the benefit of the corporation, is reasonable, and amply sustained by authorities. See opinion of DAVIES, J., in *Hartridge et al.* v. *Rockwell et al.*, R. M. Charlton (Ga.) 260.

VI. It is insisted that this stock was transferred for the purpose of giving the preponderance of votes to the respondents. We have no doubt that such motives were strong inducements at the time, and that the respondents were determined to resort to every lawful agency to maintain their position, and repel the movement of the relator. We have no opinion of the merits of the controversy, or of the wisdom or propriety of the acts of the parties, as disclosed by the testimony. There are some matters disclosed, which, in the forum of conscience, would be obnoxious to criticism, that are not unlawful, and are not properly brought in question in this proceeding. The case shows that the stock was not merely transferred, but sold; and that the sale was actual, not colorable; and that there was no secret trust or condition; that the sale was for a necessary purpose, and beneficial to the company; that the full value was to be paid to the corporation, which has gone to its use. We think such sale is not void, but, like any other sale, can be impeached only for cause. And that the controlling inducement for the purchase, at the time, of the stock was, to enable the purchaser and his friends to out-vote the relator and *his* friends, does not vitiate the sale, if otherwise for honest purposes, and for full value. We think also, that the consideration having gone to the use of the corporation, without challenge or seasonable proceedings to rescind or avoid the sale, the sale has become ratified and adopted by acquiescence. And we do not think that the reasons

and principles that have guided this decision, are the novel and sinister outgrowth of some abnormal state of things in this state, as was remotely hinted in the argument, and peculiar to Vermont, but are universal as jurisprudence, and fundamental as justice.

The rule to show cause is therefore discharged, and the petition dismissed.

Supreme Court of Ohio.

GAYLORD ET AL. *v.* IMHOFF ET AL.

The members of an insolvent firm are not entitled to the statutory exemptions out of the partnership property after it has been seized in execution by partnership creditors, notwithstanding all the members join in demanding the exemptions.

ERROR to the Superior Court of Cincinnati.

The plaintiffs in error obtained judgment against the defendants Michael Imhoff, Henry Steinegerway and George Pfluger, partners doing business as M. Imhoff & Co.; execution was issued and levied upon a leasehold and machinery belonging to the defendants as co-partners. The defendants severally demanded the statutory exemptions out of the property; but the sheriff, disregarding the demands, sold the property and brought the proceeds into court. The defendants then moved the court to give each of them the sum of $500 out of the money arising from the sale of the property in lieu of the property itself.

On the hearing of the motion, it was agreed between the parties as follows: "That all the property levied on and sold was partnership property, including the leasehold, and that the affidavit and demand of exemption by the defendants were filed with the sheriff before the sale, setting forth that they were heads of families, residents of the state, and not the owners of homesteads or any other property." The motion of the defendants was allowed, and the court ordered the sheriff to pay to each of them, out of the proceeds of the sale in his hands, the sum of $500, in all $1500, and if the proceeds should be insufficient, then to pay to each of the partners one-third of the sum remaining in his hands after the payment of costs.

The plaintiffs excepted to the allowance of the motion and the order of the court thereon, and the rulings of the court in these respects, were assigned for error here.